LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. [redacted] 185

BEDFORD-NUGENT CORPORATION,
AN INDIANA CORPORATION,
Petitioner,

vs.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 215, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

EDWARD J. FILLENWARTH,
EDWARD J. FILLENWARTH, JR.,
607 Merchants Bank Building,
Indianapolis, Indiana 46204,
WILBUR F. DASSEL,
203 Court Building,
Evansville, Indiana,
Attorneys for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 58

INDEX.

		PAGE
I.	Opinions Below	1
II.	Jurisdiction	2
III.	Statute Involved	2
IV.	Question Presented	4
V.	Statement of the Case	4
VI.	Summary of Argument	5
VII.	Argument	7
	1. Primary picketing and primary activity only involved	7
	2. Primary picketing and primary activity do not constitute violation of 8 (b) (4) and proviso thereto	14
	3. Primary picketing and primary activity did not involve common situs picketing, etc.	17
	4. Previous Court decision dispositive of issue herein	22
VIII.	Conclusion	23

List of Authorities.

Cases Cited.

Bedford-Nugent Corporation, an Indiana corporation, v. Chauffeurs, Teamsters and Helpers, Local Union No. 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (C. A. 7, 1966), 258 F. 2d 21.....5, 8, 9, 14, 15, 16, 18, 22

Construction and General Laborers Local Union No. 438, AFL-CIO v. Hardy Engineering and Construction Company, Inc. (C. A. 5, 1965), 354 F. 2d 27....20, 21

International Brotherhood of Electrical Workers, Local 501, et al. v. National Labor Relations Board (1951), 341 U. S. 694; 95 L. Ed. 1299.....18, 19, 20

Local 20, Teamsters, Chauffeurs and Helpers Union, etc. v. Lester Morton, d/b/a Lester Morton Trucking Co. (1964), 377 U. S. 252; 84 S. Ct. 1253, 12 L. Ed. 2d 280 .....15, 17

Local 74, United Brotherhood of Carpenters and Joiners of America, et al. v. National Labor Relations Board (1951), 341 U. S. 707; 95 L. Ed. 1309..18, 19

Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. National Labor Relations Board, et al. (1961), 366 U. S. 667-672-673-680-681; 6 L. Ed. 2d 592-597-601-02; 81 S. Ct. 1285 .....10, 11, 15, 16, 23

Morton v. Local 20, Teamsters, Chauffeurs and Helpers Union, etc. (U. S. D. C. N. D. of Ohio, W. D., 1961), 200 F. Supp. 653-659.....17,18

National Labor Relations Board v. Denver Building and Construction Trades Council, et al. (1951), 341 U. S. 675; 95 L. Ed. 1284.....18, 19, 20

National Labor Relations Board v. International Rice Milling Company, Inc., et al. (1951), 341 U. S. 665-666-667-671-672; 95 L. Ed. 1277-1279-1282 . . . . . 9, 14, 16, 18, 23

Superior Derrick Corporation v. National Labor Relations Board (C. A. 5, 1960), 278 F. 2d 891, cert. den. 364 U. S. 816 . . . . . 20, 21

United Brick and Clay Workers of America, et al. v. Deena Artware, Inc. (C. A. 6, 1952), 198 F. 2d 637, cert. den. (1953), 345 U. S. 906 20

United Steelworkers of America, AFL-CIO, et al. v. National Labor Relations Board, et al. (1964), 376 U. S. 492-498-499; 11 L. Ed. 2d 863-867-868 . . . . . 8, 10, 11, 12, 14, 15, 16, 23

Statutes Cited.

Section 303 of the Labor Management Relations Act, 1947, as amended; June 23, 1947, c. 120, Title III, Section 303, 61 Stat. 158; Sept. 14, 1959, Pub. L. 86-257, Title VII, Section 704 (e), 73 Stat. 545; 29 U. S. C. Section 187 . . . . . 2, 5, 6, 7, 8, 9, 13, 14

Section 158 (b) (4) of the National Labor Relations Act, as amended; July 5, 1935, c. 372, Section 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, Section 101, 61 Stat. 140; Oct. 22, 1951, c. 534, Section 1 (b) 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, Section 201 (e), Title VII, Sections 704 (a)-(c), 705 (a), 73 Stat. 525, 542, 547; 29 U. S. C. Section 158 (b) (4) (B) 2, 3, 5, 6, 7, 8, 10, 13, 14, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1367.

BEDFORD-NUGENT CORPORATION,
AN INDIANA CORPORATION,

Petitioner,

vs.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 215, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

I.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on March 3, 1966, and is reported in 358 F. 2d 21; it is also set forth as Appendix A, on pages 19 to 26 of the Petition; the Judgment, and Findings Of Fact And Conclusions Of Law of the United States District Court for the Southern District of Indiana,

Evansville Division, are not reported, but such are set forth in Appendix B, on pages 27 to 30 of the Petition.

II.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 3, 1966; the Petition was filed herein on May 31, 1966. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

III.

STATUTE INVOLVED.

Section 303 of the Labor Management Relations Act, 1947, as amended, which reads as follows:

> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."
>
> (June 23, 1947, c. 120, Title III, Section 303, 61 Stat. 158; Sept. 14, 1959, Pub. L. 86-257, Title VII, Section 704(e), 73 Stat. 545; 29 U. S. C. Section 187.)

Section 158 (b)(4) of the National Labor Relations Act, as amended, insofar as it is herein pertinent, reads as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

(July 5, 1935, c. 372, Section 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, Section 101, 61 Stat. 140; Oct. 22, 1951, c. 534, Section 1(b) 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, Section 201(e), Title VII, Sections 704(a)-(c), 705(a), 73 Stat. 525, 542, 547; 29 U. S. C. Section 158(b)(4)(B).)

IV.

QUESTION PRESENTED.

Whether the primary activities of Respondent, a labor organization, at the premises of Petitioner were in violation of Section 8(b)(4) (i) and (ii) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4) (i) and (ii), and if so, whether such were, nevertheless, within the protected area of primary picketing carved out in the proviso of Section 8(b)(4)(B) of the Act, 29 U. S. C. 158 (b)(4)(B).

V.

STATEMENT OF THE CASE.

Petitioner was an Indiana corporation, having its principal office and place of business in Evansville, Indiana; it was engaged in the business of extraction and preparation of river sand and gravel in the Ohio River Valley area for sales throughout the state and in interstate commerce, but Petitioner *conducted its operations at premises in Evansville,* Indiana, *Rockport,* Indiana, *and Henderson,* Kentucky. (P. A. 27-8).

Respondent was a labor organization and was not the certified bargaining representative of Petitioner's employees; it *commenced picketing plaintiff's premises at Evansville,* Indiana, *Rockport,* Indiana, *and Henderson,* Kentucky, by and through its agents on or about September 26, 1961, and the picketing was joined in by some of Petitioner's employees, who were members of Respondent union, and the picketing continued until November 7, 1961. (P.A. 28).

In addition to *picketing Petitioner's premises,* Respondent also engaged in other activities *at the primary sites,* such as the placing of nails and tacks *at the entranceways to plaintiff's premises,* etc. (P.A. 28-9); the activities of Re-

spondent were committed *in part* for the purpose of inducing customers to refuse to transport or otherwise handle goods or materials of Petitioner (P.A. 29).

Petitioner's *sole theory of action* was for compensatory damages as provided for in Section 303 of the Labor Management Relations Act, Title 29 U. S. C. 187 (P. A. 29), which provides *only* (P. A. 29-30) for that activity declared to be an unfair labor practice under Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4).

The cause was heard by the trial court without a jury (P.A. 27), and the court found that Respondent did not commit an unfair labor practice as defined in 29 U. S. C. 158(b)(4) of the Act (P. A. 30), and thereafter the court entered judgment that Petitioner's cause of action be dismissed (P.A. 27).

On March 3, 1966, the U. S. Court of Appeals for the Seventh Circuit affirmed the judgment of the trial court (P. A. 19-26; 358 F. 2d 21).

VI.

SUMMARY OF ARGUMENT.

Petitioner's sole theory of action was for compensatory damages as provided for in Section 303 of the Labor Management Relations Act, 29 U. S. C. 187, which provides damages only for that activity declared to be an unfair labor practice under Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4).

The trial court found that this case involves only picketing and activities at the premises of the Petitioner, i.e., only primary picketing and primary activity at the premises of Pettioner. The activity herein does not involve common situs or separate gate picketing or activities, or

the contacting of customers, employees of customers, or others away from the picket lines. Since Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4), is not directed at primary picketing and primary activity, and since Respondent was engaging only in primary picketing and primary activity at the premises of Petitioner, then such primary picketing and primary activity of the Respondent herein are not within the proscription of Section 8(b)(4), and especially is such so, in view of the proviso to Section 8(b)(4).

Section 303, 29 U. S. C. 187, does not provide for general relief for any activity of a labor organization, but was designed to vest the Federal District Courts with jurisdiction of suits for damages against unions in only a limited class of unfair labor practices; if Respondent has engaged in any unlawful primary activity, redress for such must be found under the provisions of some law other than Section 303.

Merely because customers, and employees of customers, or others, came to the picket line as conducted by Respondent at the primary premises of Petitioner, and merely because such persons turned away, or were turned away by the primary activities of Respondent, neverthless secondary activity is not automatically thereby involved; customers and employees of customers who sought entrance to the premises of Petitioner obviously approached such premises with a mission contributing to the operations of the Petitioner, for undoubtedly customers are essential to the continued operation of the business of Petitioner.

In reaching its decision in the instant case, the Court of Appeals for the Seventh Circuit did not decide a question which had not been heretofore decided by this Court; nor, did the Court of Appeals decide a question in conflict with applicable decisions of this Court, for, in a least three instances, this Court has rather conclusively stated that

primary picketing and primary activities, as carried on by Respondent at the primary premises of Petitioner, do not constitute a violation of Section 303, 29 U. S. C. 187, or Section 8(b)(4), 29 U. S. C. 158(b)(4).

VII.

ARGUMENT.

1.

Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4), is not directed at primary picketing and primary activity; respondent was engaged only in primary picketing and primary activity at the premises of petitioner, which primary picketing and primary activity are not within the proscription of Section 8(b)(4), and especially is such so, in view of the proviso to Section 8(b)(4).

Among other things, the trial court found: that Respondent was not the certified bargaining agent of Petitioner's employees, and that Respondent picketed the three primary sites or premises of Petitioner at Evansville and Rockport, Indiana, and Henderson, Kentucky; that the picketing was joined in by some of Petitioner's employees who were members of Respondent Union; in addition to the picketing of Petitioner's premises, Respondent engaged in other activities at the primary sites, including the placing of nails and tacks at the entranceways to Petitioner's premises, etc., which activities were committed in part for the purpose of inducing customers to refuse to transport or otherwise handle Petitioner's goods and materials; and, that Petitioner's sole theory of action was for compensatory damages as provided for in Section 303 of the Labor Management Relations Act, as amended, 29 U. S. C. 187. (P. A. 27-29).

From the above facts the trial court concluded, among other things: that whatever the court's general reaction to Respondent's conduct might be, nevertheless the court was limited to evaluating such conduct solely in the light of Petitioner's declared theory of action, and the Petitioner founded its action solely upon Section 303 of the Labor Management Relations Act, as amended, 29 U. S. C. 187; that this section does not provide for general relief for any activity of a labor organization, but rather provides relief only for that activity declared to be an unfair labor practice under 29 U. S. C. 158(b)(4); that whether or not Respondent may have violated some other federal or state law, it did not commit an unfair labor practice as defined in 29 U. S. C. 158(b)(4); (P. A. 29-30).

The Court of Appeals for the Seventh Circuit concluded, among other things: that this case involves only picketing and activities at the premises of the Petitioner; that this case does not involve common situs or separate gate picketing or activities, or the contacting of customers, employees of customers, or others, away from the primary picket lines; (P. A. 21-2; 258 F. 2d 21-23); that customers and employees of customers, who seek entrance to the primary employer's premises, approach such situs with a mission "contributing to the operations" of the primary employer; that customers are essential to the continued operation of Petitioner's business; that to deter them from entering Petitioner's premises is certainly an application of economic pressure at the primary situs; that the *Steelworkers* case (376 U. S. 492) is dispositive of the issue here; that both the situs and the object of the picketing were primary and therefore the Respondent's conduct, although reprehensible, did not constitute an unfair labor practice as defined in Section 8(b)(4); P. A. 23-24; 258 F. 2d 21-24); and, that redress for the unlawful aspect of such primary picketing must be found under the provisions of some law other than Section

303 (29 U. S. C. 187), which is designed to vest the federal district courts with jurisdiction of suits for damages against unions in but a limited class of unfair labor practices (P. A. 25; 258 F. 2d 21-25).

This Court, as noted by the District Court and the Court of Appeals in their respective opinions in the instant case, has heretofore decided the question involved in this proceeding. (P. A. 30; P. A. 23; 258 F. 2d 21-24).

In the case of *National Labor Relations Board* v. *International Rice Milling Company, Inc., et al.* (1951), 341 U. S. 665-666-667-671-672; 95 L. Ed. 1277-1279-1282, this Court stated:

> "The question presented is whether a union violated Section 8(b)(4) of the National Labor Relations Act, as amended by the Labor Management Relations Act (June 23) 1947), under the following circumstances: Although not certified or recognized as the representative of the employees of a certain mill engaged in interstate commerce, the agents of the union picketed the mill with the object of securing recognition of the union as the collective bargaining representative of the mill employees. In the course of their picketing, the agents sought to influence, or in the language of the statute they 'encouraged,' two men in charge of a truck of a *neutral customer* of the mill to refuse, in the course of their employment, *to go to the mill for an order of goods.* For the reasons hereinafter stated, we hold that such conduct did not violate Section 8(b)(4). (341 U. S. 665-6-7). (Emphasis added).
>
> • • • • •
>
> "• • • There were no inducements or encouragements applied elsewhere than on the picket line. • • •. (341 U. S. 665-671).
>
> "In the instant case the violence on the picket line is not material. The complaint was not based upon that violence, as such. To reach it, the complaint more properly would have relied upon Section 8(b)(1)(A) or would have addressed itself to local au-

thorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with Section 8(b)(4). It is the object of union encouragement that is proscribed by that section rather than the means adopted to make it felt." (341 U. S. 665-672).

In the case of *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board, et al:* (1961), 366 U. S. 667-672-673-680-681; 6 L. Ed. 2d 592-597-601-602; 81 S. Ct. 1285, commonly referred to by this Court as the *"General Electric Case"* in 376 U. S. 492-496, the Court reviewed extensively N. L. R. B. Decisions and its own Judicial Decisions with respect to primary and secondary picketing, ambulatory picketing, common situs picketing, and separate gate picketing; in such case, the union called a strike and picketed all gates leading to the extensive premises of General Electric, including a gate, that some six (6) or seven (7) months prior to the strike had been designated as "Gate 3-A For Employees Of Contractors Only—G. E. Employees Use Other Gates." The said "Gate 3-A" was some 550 feet away from the nearest entrance available for General Electric employees, suppliers, and deliverymen; the Court ordered that "the case must be remanded by the Court of Appeals to the Board" (366 U. S. 667-682), for it appeared in reaching their respective decisions, that the Board and the Court of Appeals "did not take into account that if Gate 3-A was in fact used by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a mingled one outside the bar of Section 8(b)(4)(A)." (366 U. S. 667-682).

With respect to Section 8(b)(4), this Court in said case stated:

"This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity. 'While Section 8(b)(4) does not expressly mention "primary" or "secondary" disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's "secondary" boycott sections.' *NLRB* v. *Denver Bldg. and Constr. Trades Council*, 341 U. S. 675, 95 L. Ed. 1284-1294, 71 S. Ct. 943. * * *. Thus the Section 'left a striking labor organization free to use persuasion, including picketing, *not only on the primary employer and his employees, but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer and persons dealing* with them * * *.'" (366 U. S. 667-672.) (Emphasis added.)

* * * * *

"From this necessary survey of the course of the Board's treatment of our problem, the precise nature of the issue before us emerges. With due regard to the relation between the Board's function and the scope of judicial review of its rulings, the question is whether the Board may apply the Dry Dock criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises. The effect of such a holding would not bar the union from picketing at all gates used by *employees, suppliers, and customers* of the struck employer. * * *." (336 U. S. 667-680.) (Emphasis added.)

In the case of *United Steelworkers of America, AFL-CIO, et al.* v. *National Labor Relations Board, et al.* (1964), 376 U. S. 492-498-499; 11 L. Ed. 2d 863-867-868, a union picketed not only the several entrances to an employer's plant, but also picketed a so-called "railroad gate" entrance, opening onto a railroad spur, which spur ran to the struck bound employer's premises and was also used to serve the railroad needs of other companies; the union picketed at the "railroad gate" when the railroad began to move railroad

cars to or from the struck bound employer, but did not picket when the railroad moved cars to or from the other companies located on the spur.

Wtih respect to such facts, this Court, among other things stated:

> "The activities of the union in this case clearly fall within clauses (i) and (ii) of Section 8(b)(4); likewise the objective, to induce the railroad to cease providing freight service to Carrier for the duration of the strike, is covered by the language of subsection (B), *exclusive of the proviso. The question we have is whether the activities of the union, although literally within the definition of secondary activities contained in clauses (i) and (ii) of Section 8(b)(4), are nevertheless within the protected area of primary picketing carved out by Congress in the proviso to subsection (B).* (376 U. S. 492-496.) (Emphasis added.)
>
> "The dividing line between forbidden secondary activity and protected primary activity has been the subject of intense litigation both before and after the 1959 amendments to Section 8(b)(4), which broadened the coverage of the section *but also added the express exceptions for the primary strike and primary picketing.* We need not detail the course of this sometimes confusing litigation; for in the *General Electric* case, supra, (366 U. S. 667, 6 L. Ed. 2d 592, 81 S. Ct. 1285), the Court undertook to survey the cases dealing with picketing at both primary and secondary sites and the result reached in that case largely governs this one. * * *. (376 U. S. 492-496.) (Emphasis added.)
>
> * * * * *
>
> "Although the picketing in the *General Electric* case occurred prior to the 1959 amendments to Section 8(b)(4), the decision was rendered in 1961 and the Court bottomed its decision upon the amended law and its legislative history. *We think General Electric's construction of the proviso to Section 8(b)(4)(B) is sound and we will not disturb it. The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations*

> *of the struck employer.* But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been *aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt.* * * *." (376 U. S. 492-498-9.) (Emphasis added.)

In short, Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158 (b) (4), is not directed at primary picketing and primary activity, and, especially is such so in the light of the proviso to Section 8(b)(4), as heretofore determined by this Court.

Respondent was engaged only in primary picketing and primary activity at the premises of the Petitioner; therefore such does not come within the proscription of Section 8(b)(4), and especially is this true in view of the proviso thereto.

Petitioner very generally asserts in the last paragraph on page 17 of its Petition, that "If the decision in this case is allowed to stand, a labor organization may, with impunity and practically without limitation, insofar as Federal labor law is concerned, threaten, coerce and restrain customers of a primary employer for the object of forcing such customers to cease doing business with the primary employer, so long as the union activity is confined to the premises of the primary employer."

It was clearly found by the District Court: that Petitioner's theory of action was founded solely upon Section 303 of the Labor Management Relations Act, 29 U. S. C. 187; that said Section does not provide for *general relief for any activity* of a labor organization; and, that whether or not Respondent "may have violated some other federal or state law," Respondent "did not commit an unfair

labor practice as defined in Title 29 U. S. C. A. Section 158 (b) (4)," (P. A. 29-30).

With respect to the above quoted very general statement of Petitioner, the Court of Appeals for the Seventh Circuit appropriately concluded that "Accordingly, redress for the unlawful aspect of such primary picketing must be found under the provisions of some law other than Section 303 which is designed to vest the federal district courts with jurisdiction of suits for damages against unions in but a limited class of unfair labor practices." (P. A. 25; 358 F. 2d 21-25).

This Court has heretofore come to the same conclusion. *National Labor Relations Board* v. *International Rice Milling Company, Inc., et al.* (1951), 341 U. S. 665-672-673; 95 L. Ed. 1277-1282-1283; *United Steelworkers of America, AFL-CIO, et al.* v. *National Labor Relations Board, et al.* (1964), 376 U. S. 492-501-502; 11 L. Ed. 2d 863-869, 84 S. Ct. 899.

2.

Primary picketing and primary activity by Respondent at the premises of Petitioner, did not Constitute an unfair labor practice as proscribed by Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4), and the proviso thereto, merely because employees of Petitioner, employees of other employers, customers of Petitioner, employees of customers of Petitioner, or suppliers of Petitioner, came to the premises of Petitioner and turned away or were turned away by the primary picketing and primary activity.

Petitioner consistently asserts in its Petition; by some circuitous reasoning, that since the primary picketing and primary activity at the premises of Petitioner were conducted "in part for the purpose of inducing customers to refuse to transport or otherwise handle" Petitioner's goods

and materials, then such primary picketing and primary activity became secondary picketing and secondary activity as proscribed in Section 8(b)(4).

In its Petition herein, as before the Court of Appeals for the Seventh Circuit, Petitioner relies extensively on the case of *Local 20, Teamsters, Chauffeurs and Helpers Union, etc.* v. *Lester Morton, d/b/a Lester Morton Trucking Co.* (1964), 377 U. S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280; Petitioner also contends before this Court, as it did before the Court of Appeals, that the case of *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board, et al.* (1961), 366 U. S. 667, 81 S. Ct. 1285, 6 L. Ed. 2d 592, commonly referred to as the *General Electric* case, and, the case of *United Steelworkers of America, AFL-CIO, et al.* v. *National Labor Relations Board, et al.* (1964), 376 U. S. 492, 84 S. Ct. 899, 11 L. Ed. 2d 863, commonly referred to as the *Steelworkers* case, "are distinguishable from the instant case and should not control" (P. B. 8); with respect to all of the above, the Court of Appeals rather tersely stated that "(the *General Electric* case), in which the Court took occasion to survey the cases dealing with picketing at both primary and secondary sites, convinces us that it is *Steelworkers* which is controlling here and that *Morton* is distinguishable." (P. A. 23; 358 F. 2d 21-24.)

The Court of Appeals, somewhat pointedly, went on to state that Petitioner's

> "* * * reliance on *Morton* is misplaced. The facts there involved, as disclosed in the District Court's opinion (200 F. Supp. 653, 659 and 600), reveal that contacts were made by the union representatives with the employees of O'Connel Coal Company, a customer of the primary employer, not at the latter's premises but at sites away from the primary picket line. Such activity was secondary and not affected by the proviso to subsection (B). And it was the away from the prim-

ary situs feature of the activities which was controlling as to the O'Connel phase of the *Morton* case." (P. A. 24; 358 F. 2d 21-24.)

With respect to the question of the approach by customers and employees of customers to the primary picketing and primary activity of Respondent at Petitioner's premises, the Court of Appeals quite decisively stated:

> "We think it obvious that customers and employees of customers who seek entrance to the primary employer's premises are likewise neutrals who approach the situs with a mission 'contributing to the operations' of the primary employer. Customers are essential to the continued operation of the plaintiff's business. To deter them from entering the plaintiff's premises is certainly an application of economic pressure at the primary situs. We agree with the District Court that *Steelworkers* is dispositive of the issue here presented. Both the situs and the object of the picketing were primary and therefore the Union's conduct, although reprehensible, did not constitute an unfair labor practice as defined in Section 8(b)(4)." (P. A. 23-24; 358 F. 2d 21-24.)

International Rice Milling (1951), 341 U. S. 665-667-671-672, the *General Electric* case (1961), 366 U. S. 667-672-673-680-681, and the *Steelworkers* case (1964), 376 U. S. 492-498-499, are, to use an expression of the District Court, "controlling of the questions at bar" (P. A. 30), and, to use an expression of the Court of Appeals, are "dispositive of the issue here presented" (P. A. 23; 358 F. 2d 21-24), as to customers and employees of customers approaching primary picketing or primary activity at the premises of Petitioner.

3.

The instant case involves only primary picketing and primary activity at the premises of Petitioner, and therefore does not involve in any way common situs picketing, separate construction gate picketing, railroad gate picketing, moving a primary picket from the primary premises to a construction site some distance away from the primary picketing, moving a primary picket from the primary premises to the premises of a secondary employer, or contacting the employees of a secondary employer away from the primary picket line.

On pages 13 to 17 of the Petition, several cases are cited and rather abstract portions are quoted therefrom; in addition thereto, Petitioner sets forth general statements of its own as to what the decided cases hold; as for example, on pages 15 and 16 of the Petition, it is quite authoritatively stated by Petitioner that "*In Local 20, Teamsters, Chauffeurs & Helpers Union, etc.* v. *Lester Morton* (1964), 377 U. S. 252, the inducement of customers to cease doing business with the primary employer was held to be violative of Section 303. * * *. Although the District Court opinion in the *Morton* case does mention the 'away from the primary situs' facts, 200 F. Supp. 659, nothing in the opinion indicates that the location of the activities was considered to be decisive. Likewise, these facts were not relied upon by the Court of Appeals in the *Morton* case, 320 F. 2d 505. This Court did not even mention these so-called 'controlling' facts when affirming the award of damages based upon the O'Connel incidents. 377 U. S. 252."

An examination of the opinion of this Court in the *Morton* case, does not disclose clearly the "customer" facts involving the O'Connel Company; however, the District Court's opinion in the case of *Morton* v. *Local 20, Team-*

sters, Chauffeurs, and Helpers Union, etc. (U. S. D. C. N. D. of Ohio, W. D., 1961), 200 F. Supp. 653, readily discloses that representatives of the union alerted and contacted employees of the O'Connel Company *away from the picket line* by means of the telephone and personal visits (200 F. Supp. 653-659), thereby making such activity *secondary* in character. The facts in the *Morton* case as to "customer" O'Connel Company are not at all like the "customer" facts in the instant case; the only picketing and the only activity in the case at bar was at the premises of the Petitioner; all of the picketing and the activity herein was primary, even with respect to those "customers" of Petitioner who came up to the picket line at the premises of Petitioner and turned away, or were turned away.

The Court of Appeals for the Seventh Circuit in the instant case (P.A. 24; 358 F. 2d 21-24), has very aptly responded to Petitioner's *general* assertions as to Petitioner's concept of the decision of this Court in the *Morton* case, when said court stated that "Plaintiff's (Petitioner's) reliance on *Morton* is misplaced. * * *. And it was the away from the primary situs feature of the activities which was controlling as to the O'Connel phase of the *Morton* case"

Petitioner has generally attempted to misconstrue the ruling of this Court in *International Rice Milling* (341 U. S. 665), and, with respect to the cases of (a) *National Labor Relations Board* v. *Denver Building and Construction Trades Council, et al.* (1951) 341 U. S. 675, (b) *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board* (1951), 341 U. S. 694, and (c) *Local 74, United Brotherhood of Carpenters and Joiners, et al.* v. *National Labor Relations Board* (1951), 341 U. S. 707, Petitioner has indiscretely but rather blatantly asserted on page 15 of the Petition that "In each of these cases, this Court found 8(b)(4) violations, notwithstanding that all activity was at the primary premises."

In response to the above "general" statement of Petitioner, suffice it to say, that *Denver Building Trades* case (341 U. S. 675) involved *common premises or common situs picketing at a construction site,* wherein the unions (Building Trades Council) erected a picket at a construction site because an electrical subcontractor employed nonunion workmen, and the picket sign was directed at the entire job, for it read: "This job unfair to Denver Building and Construction Trades Council." Aside from other differences involved in the *Denver* case, the picketing was not at the primary premises of the electrical subcontractor.

As to the *Electrical Workers, Local 501* case (341 U. S. 694) such again involved common premises or common situs picketing at a construction site; the general contractor subcontracted the electrical work to an electrician who employed nonunion electricians; the construction site was at Greenwich, Connecticut, and the principal place of business of the electrical subcontractor was at Port Chester; the picket sign in this case was likewise directed at the entire construction job, for it read: "This job is unfair to organized labor." And, as stated above with respect to the *Denver Building* case, aside from other differences in the case, the picketing in *Electrical Workers, Local 501* was not at the primary premises of the electrical subcontractor.

In the *Carpenters, Local 74* case (341 U. S. 707) the union maintained a picket in front of Watson's store from the latter part of March until August 28, 1947, which picket placards announced that Watson's was "unfair to organized labor" or that "This store employs non-union labor." On August 7, 1947, one Stanley contracted with one Parker to renovate and improve a dwelling near Chattanooga; Parker subcontracted the installation of the wall and floor covering to Watson, and on one occasion the union representative came to the Stanley job site and instructed the union carpenters working for Parker, that they could no

longer work with nonunion men; at intervals the union carpenters walked off the job; as mentioned above with respect to the *Denver Building* and *Electrical Workers* cases, aside from other differences, the picketing at Watson's premises in Chattanooga was not affected in any way, as the *Complaint* by the N. L. R. B. was against the union's "*extension* of their activities to the Stanley project by there ordering a strike" (341 U. S. 712), i.e., illegal activity, as contended by the N. L. R. B. and this Court, which was the picketing conducted away from the primary premises of Watson.

Petitioner likewise generally cites the cases of *United Brick and Clay Workers of America, et al.* v. *Deena Artware, Inc.* (C. A. 6, 1952), 198 F. 2d 637, cert. den., (1953), 345 U. S. 906, *Construction and General Laborers Local Union No. 438, AFL-CIO* v. *Hardy Engineering And Construction Company, Inc.* (C. A. 5, 1965), 354 F. 2d 27, and *Superior Derrick Corporation* v. *National Labor Relations Board* (C. A. 5), 278 F. 2d 891, cert. den. 364 U. S. 816.

In the *Deena Artware* case, said company had a place of business located on the southwest corner of a certain tract of ground; following a failure to reach a collective bargaining agreement with the union, a strike took place and picketing was commenced on or about May 26, 1948; on or about December 8, 1947, the company entered into a contract with an independent general contractor to erect a new manufacturing plant and warehouse on the company property, north of the old company plant and warehouse; the union picketed not only the entrances to the old plant and warehouse but also picketed the new construction to the north of the existing plant and warehouse; thus the picketing involved neutral employers and neutral employees thereof, who were not engaged in performing day to day operations of the company, and on such basis is

quite different from the facts involved in the case at bar (366 U. S. 667; 376 U. S. 492).

In the *Hardy Engineering* case, the company was the general contractor engaged to construct a school on a large irregularly shaped tract of land; the McKinney Drilling Company, a secondary employer, was under a contract with Hardy Engineering to perform some foundation work; Hardy's employees, at the time, were common laborers, who were not represented by any union, and used a roadway which opened on Westview Drive; the employees of McKinney, the secondary employer, entered and left the grounds by way of an entrance on Fair Street; there was a conflict in the testimony as to the proximity of the areas in which the employees of the respective employers worked, which conflict was resolved in favor of Hardy by the trial court, and the evidence showed that Hardy's employees were working in an area far removed from the Fair Street entrance; the union endeavored to persuade Hardy to adopt the union scale, and when such effort proved unsuccessful, the union placed pickets at the Fair Street entrance, as used by the secondary employees, and not at the Westview Drive, as used by the employees of Hardy, the primary employer; thus, the picketing was not placed at the primary entrance of Hardy, the primary employer, but placed at the entrance used by secondary employers and secondary employees, and therefore the *Hardy Engineering* case is quite different from the case at bar.

The case of *Superior Derrick,* involved an unsuccessful effort on the part of the union to organize the employees of that company; picketing was conducted at a wharf, and a gangway was the only means by which union longshoremen could board a ship and by which employees of the company could go from shore onto a company barge; during a lunch hour, the union erected a picket at the foot of the gangway and when the longshoremen returned, they refused to cross

the picket line; the court held that it was a duty of the union to advise the longshoremen that the union was not picketing the ship, but, in any event, at least there was a common situs involved in the *Superior Derrick* case, which again, as stated above with respect to the other cases cited by Petitioner, clearly distinguishes it from the case at bar.

Apparently, Petitioner has been unable to find any authority to sustain its position, for all the authority, and particularly the decisions of this Court, are in support of the position of the Respondent, as clearly enunciated by the District Court (P. A. 29-30), and the Court of Appeals for the Seventh Circuit (P. A. 19-26; 358 F. 2d 21).

The case at bar, as heretofore stated, involves only primary picketing and primary activity at the premises of Petitioner; or, to use the clear and succinct statement of the Court of Appeals (P. A. 21-22; 358 F. 2d 21-23):

> "It is apparent from the court's factual findings that this case involves only picketing and activities at the premises of the employer. It does not involve common situs or separate gate picketing or activities, or the contacting of customers, employees of customers, or others, away from the primary picket lines at the employer's premises."

4.

The Court of Appeals for the Seventh Circuit has not decided in the instant case, a question which has not been heretofore settled by this Court, and the Court of Appeals has not decided in the instant case, a question in conflict with applicable decisions of this Court.

Petitioner contends the Court of Appeals has decided a question in the instant case, which heretofore has not been, but should be settled by this Court; or, Petitioner contends in an alternative effort, that the Court of Appeals

has decided a question in a way in conflict with applicable decisions of this Court.

In opposition to such alternative positions of Petitioner, the Respondent incorporates hereunder, the preceding portions of its Argument herein, and for the sake of brevity, again respectfully cites as applicable dispositive decisions of this Court on the issue herein, the cases of *National Labor Relations Board* v. *International Rice Milling, Inc., et al.* (1951), 341 U. S. 665-666-667-672; 95 L. Ed. 1277-1279-1282; *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board, et al.* (1961), 366 U. S. 667-672-673-680-681; 6 L. Ed. 2d 592-597-601-602; 81 S. Ct. 1285; *United Steelworkers of America, AFL-CIO, et al.* v. *National Labor Relations Board, et al.* (1964), 376 U. S. 492-498-499; 11 L. Ed. 2d 863-867-868.

VIII.

CONCLUSION.

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EDWARD J. FILLENWARTH,
EDWARD J. FILLENWARTH, JR.,
607 Merchants Bank Building,
Indianapolis, Indiana 46204,

WILBUR F. DASSEL,
203 Court Building,
Evansville, Indiana,
Attorneys for Respondent.

END